Supreme Court, U.S.
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92-1967
No. _____

In The
Supreme Court of the United States
October Term, 1992

SILVER CLOUD, INC. d/b/a COLUMBIANA PLASTICS; and STEPHEN J. MOTOSKO, II,

Petitioners,

v.

NATIONAL KITCHEN PRODUCTS; EDWARD J. MORRIS AND QUIKUT, A DIVISION OF SCOTT & FETZER COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented has two parts:

1. Whether a motion filed pursuant to Rule 59(e), F.R. Civ. P., remains pending until the district court makes and dockets an oral or written decision upon the motion; and

2. Whether a motion filed pursuant to Rule 59(e), F.R. Civ. P., which is technically interlocutory because it is directed at fewer than all of the claims in the litigation is, nevertheless, a Rule 59(e) motion;

so that a notice of appeal from the merits judgment, filed before any decision, whether oral or written, upon the Rule 59(e) motion has been made, is premature.

STATEMENT OF PARTIES

All parties in the court below are named in the caption. Silver Cloud, Inc., d/b/a Columbiana Plastics, is a Delaware corporation owned by the other petitioner herein, Stephen J. Motosko, II. Petitioners were plaintiffs in the district court and were appellants below.

Respondent National Kitchen Products is a corporation wholly-owned by Respondent Edward J. Morris. Respondent Quikut is a Division of Scott & Fetzer Company, a Delaware corporation. Respondents were defendants in the district court and were appellees below.[1]

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[1] Respondent Quikut filed a separate appeal (No. 92-4373), which is still pending in the court below.

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No. _____

In The

Supreme Court of the United States

October Term, 1992

SILVER CLOUD, INC. d/b/a COLUMBIANA PLASTICS; and STEPHEN J. MOTOSKO, II,

Petitioners,

v.

NATIONAL KITCHEN PRODUCTS; EDWARD J. MORRIS AND QUIKUT, A DIVISION OF SCOTT & FETZER COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Silver Cloud, Inc., d/b/a/ Columbiana Plastics ("Silver Cloud"), and Stephen J. Motosko, II ("Motosko") respectfully petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, dismissing on timeliness grounds the Petitioners' appeal from a directed verdict (and final judgment) dismissing their anti-trust claims against the respondents National Kitchen Products ("NKP"), Edward J. Morris ("Morris"), and Quikut, Division of Scott & Fetzer Company ("Quikut").

Petitioners argued below that their appeal could not be dismissed on timeliness grounds, since there was still pending in the district court a "motion for reconsideration," which constituted a motion to alter or amend a judgment pursuant to Rule 59(e), F.R. Civ. P., and that their appeal could be dismissed only as being prematurely filed.

The Court of Appeals held that a "motion for reconsideration" of a directed verdict of dismissal is not a motion pursuant to Rule 59(e), F.R. Civ. P., if it is directed at fewer than all of a plaintiffs' claims and, in any event, the motion in the instant case was "effectively" overruled when the district court submitted Petitioners' remaining claim to the jury.

OPINIONS AND ORDERS BELOW

The district court never entered a decision, either oral or written, upon the "Plaintiffs' Motion for Reconsideration."

The district court entered final judgment on October 14, 1992 (Appendix B hereto).

The Court of Appeals entered its decision dismissing the Petitioners' notice of appeal on March 18, 1993 (Appendix A hereto).

JURISDICTION

1. The district court's jurisdiction was based upon Section 4(A) of the Clayton Act, 15 U.S.C., Section 15(A), and upon 28 U.S.C., Sections 1331 and 1337.

2. The Court of Appeals issued its decision on March 18, 1993, dismissing Petitioners' appeal. This Petition is being filed within ninety days of that date. This Court has jurisdiction over this case pursuant to 28 U.S.C., Section 1254(1).

STATUTES AND RULES INVOLVED

This case principally involves the following statutes and rules:

1. Rule 59, Fed. R. Civ. P., provides:

> "(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. . . .

"(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

2. Rule 4, Fed. R. App. P., provides:

"(a)(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of Ohio, Eastern Division.

Petitioners commenced this litigation by filing their Complaint against the Respondents on September 8, 1989. Briefly stated, the Petitioners' claims were as follows:

Motosko owned Silver Cloud. Motosko invented and patented a manually-operated vegetable slicer, which incorporated as its cutting edge a kitchen knife manufactured by Quikut. The vegetable slicer was specially shaped to accommodate only the Quikut knife.

In 1984, Silver Cloud entered into a contract with Quikut, under the terms of which Quikut became the exclusive distributor of Motosko's vegetable slicer. Quikut agreed to sell the vegetable slicer in the "demonstration market," where Quikut was already selling its knives. The "demonstration market" consists of several hundred professional "pitchmen," who perform demonstrations of household products, mainly at home shows and fairs. Through its knife business, Quikut had developed a list of the identities of these pitchmen and had established relationships with them.

Morris, through his company NKP, was the nation's only existing supplier of manually-operated vegetable slicers to the demonstration market.[2] He was also one of Quikut's largest knife customers. The Complaint alleged that Morris induced Quikut to breach its agreement with Silver Cloud and to refrain from entering the vegetable slicer market, in return for which Morris agreed not to compete against Quikut by entering the market as a distributor of knives.

Petitioners' Complaint contained eight separate Counts, most of which asserted violations of the Federal

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[2] The vegetable slicers that Morris distributed were not patented and did not incorporate the Quikut knife.

anti-trust laws. Petitioners also asserted a breach of contract claim against Quikut.

The case was tried to a jury in September, 1992. During the trial, Petitioners dismissed a number of the Counts in their Complaint. They sought to submit to the jury only a portion of Count I (which alleged a conspiracy between the Respondents to monopolize the market for manually-operated vegetable slicers), Count II (which alleged a combination between the Respondents in restraint of trade), and Count III (which alleged a breach of contract by Quikut).

On September 30, 1992, following the presentation of all the evidence at the jury trial, the trial judge, the Honorable Sam H. Bell, orally granted the motion of all Respondents to dismiss Petitioners' antitrust claims. (A transcript of his oral decision is Appendix D hereto)

The following day, Petitioners' counsel advised the trial judge that he wished to file a motion asking the judge to reconsider his decision granting the motion to dismiss. The trial judge stated that he would give the motion serious consideration, but in the meantime, he wanted to proceed to submit the Petitioners' remaining claim, the contract claim against Quikut, to the jury. (A transcript of this exchange is Appendix E hereto)

On October 5, 1992, Petitioners filed a lengthy "Motion for Reconsideration of the Directed Verdict Dismissing Plaintiffs' Antitrust Claims." (Docket entry 157) That motion (minus the exhibits which were attached to it) is Appendix C hereto. Petitioners moved the district court " . . . for reconsideration of its decision sustaining Defendants' motions for directed verdicts with respect to

the antitrust claims presented herein." (Appendix C, p. A6) They asked the court " . . . to vacate its order of a directed verdict and allow the jury to enter a verdict on these causes of action." (Appendix C, p. A7) Petitioners restated this request at the conclusion of their Memorandum:

> "Plaintiffs respectfully submit that the Court should, upon reconsideration, vacate its directed verdict dismissing Plaintiffs' antitrust claims." (Appendix C, p. A24)

As the docket indicates, Judge Bell has never made or entered a decision on the Plaintiffs' Motion for Reconsideration.

On October 6, Judge Bell submitted Petitioners' contract claim to the jury. The next day, the jury returned a verdict on the contract claim against Quikut in the amount of $70,000.00. (Docket entry 162)

On October 14, 1992, Judge Bell entered a final judgment incorporating the jury verdict and dismissing all of Petitioners' remaining claims with prejudice, per his oral decision of September 30 (Appendix B). He still did not rule upon Plaintiffs' Motion for Reconsideration, filed October 5th.

Petitioners sought to appeal from the judgment of October 14, 1992, insofar as it dismissed their antitrust claims against the Respondents. Quikut sought to appeal from the jury verdict rendered against it. It also moved for judgment as a matter of law and for a new trial on the contract claim.

On November 16, 1992, the district court entered an order denying Quikut's motion. On December 2, 1992, Quikut filed a notice of appeal (docketed as Case No. 92-4306). On December 7, 1992, Petitioners filed a notice of appeal (docketed as Case No. 92-4320). Petitioners' appeal is the within proceeding.[3]

On December 9, 1992, the district court entered an order denying a motion for prejudgment interest which had been filed on October 13 by the Petitioners. On December 16, 1992, Quikut filed a second notice of appeal (docketed as Case No. 92-4373). Petitioners did not file any further notices of appeal.

On February 17, 1993, Respondents moved the Court of Appeals to dismiss the Petitioners' appeal on the ground that the motion for prejudgment interest was a Rule 59(e) motion and that Petitioners' notice of appeal, which was filed before a decision on that motion, was a nullity. According to the Respondents, since the Petitioners failed to file a new notice of appeal following the decision on the motion for prejudgment interest, their appeal should be dismissed.

Petitioners responded that *both* of the appeals, theirs and Quikut's, should be dismissed, *not* because they were untimely, but because they were still *premature*. Petitioners pointed out that their "Plaintiffs' Motion for

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[3] Petitioners had filed a previous notice of appeal on November 12, 1992, which was docketed as Case No. 92-4230. This notice of appeal was subsequently dismissed as premature, since it was filed prior to November 16, 1992, when the district court rendered its decision on Quikut's motion. The Court of Appeals dismissed that notice of appeal on December 8, 1992.

Reconsideration" had never been ruled upon by the district court, and since that motion was also a Rule 59 motion, *all* existing notices of appeal were premature.

On March 18, 1993, the Court of Appeals granted Respondents' motions to dismiss Petitioners' appeal. The court held that the Plaintiffs' Motion for Reconsideration was not a Rule 59(e) motion, since it did not relate to all of the Petitioners' claims; and the court held that Judge Bell had "effectively" ruled upon the Plaintiffs' Motion for Reconsideration when he submitted Petitioners' remaining claims to the jury. (Appendix A, p. A3)

Petitioners seek a writ of certiorari from this Court to set aside the decision of the Court of Appeals.

REASONS WHY REVIEW SHOULD BE GRANTED

Rule 4(a)(1), F.R. App. P., provides that a notice of appeal must be filed within thirty days of the entry of the judgment or order from which the appeal is taken. Rule 4(a)(4), however, provides that any notice of appeal filed while a Rule 59 motion is pending is premature and, therefore, a nullity. A new notice of appeal must be filed following a decision upon all pending Rule 59 motions. That includes motions for a new trial and motions to alter or amend a judgment.

This appeal presents two important questions, one of them involving a split of authority among the Circuit Courts of Appeal.

I. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT QUESTION OF WHETHER A MOTION TO ALTER OR AMEND A JUDGMENT, EVEN AN INTERLOCUTORY ONE, WHICH IS PENDING ON THE DATE FINAL JUDGMENT IS ENTERED, IS DEEMED TO BE A RULE 59(e) MOTION

There is no provision in the Federal Rules of Civil Procedure for a "motion to reconsider." *McDowell v. Dynamics Corp. of America*, 931 F.2d 380 (6 Cir. 1991); *Smith v. Hudson*, 600 F.2d 60 (6 Cir. 1979). It has been uniformly held, however, that a "motion to reconsider" filed within ten days following the entry of judgment is treated as a motion to alter or amend the judgment under Rule 59(e). *See, e.g., McDowell, supra*, at 382; *Smith, supra*, at 62.[4] Indeed, *any* motion filed during the ten-day period, no matter how the motion is denominated, which asks a court to vacate, reconsider, or reverse its prior holding, is treated as a motion under Rule 59(e) to alter or amend the judgment. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5 Cir. 1990); *Smith v. Hudson, supra*; *U.S. v. Gargano*, 826 F.2d 610 (7 Cir. 1987); *Charles v. Daley*, 799 F.2d 343 (7 Cir. 1986) (" . . . all substantive motions served within ten days of the entry of a judgment will be treated as based on Rule 59." *Id.*, at 347.)

In the instant case, the Plaintiffs' Motion for Reconsideration was filed *prior* to the entry of judgment. As the

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[4] A "motion to reconsider" filed *more* than 10 days following the entry of a judgment is treated as a Rule 60(b) motion. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5 Cir. 1990).

Court of Appeals for the Sixth Circuit recently held, however, that makes no difference:

> "The Defendants argue that the Plaintiffs motion [to reconsider] could not properly have been treated under Rule 59(e), however, because it was made prior to the entry of judgment, and thus could not have been a motion 'to alter or amend the judgment.' This argument in our opinion lacks merit. . . . It is not unusual . . . for a putative Rule 59(e) motion to predate the formal entry of judgment. This is due to the fact that the Fed. R. Civ. P. 58 requires that judgments be entered in a document that is separate from the Court's memorandum opinion. . . . Thus, in this case, the Plaintiffs' motion cannot be read out of Rule 59(e) solely because it was prematurely filed." *Smith v. Hudson, supra* at 62.

The Plaintiffs' Motion for Reconsideration sought the vacation, reconsideration, and reversal of the district court's decision granting a directed verdict; it was filed within ten days of entry of the judgment; it, therefore, constituted a motion to alter or amend a judgment under Rule 59(e).

In the instant case, however, the Court of Appeals held that the Plaintiff's Motion for Reconsideration was not a motion to alter or amend a judgment under Rule 59(e), because it was "interlocutory," *i.e.*, it was directed at fewer than all of the claims in the litigation. According to the Court of Appeals, a motion which is interlocutory cannot be considered a motion pursuant to Rule 59(e), and, therefore, cannot toll the period for filing a notice of appeal.

That is not the rule in the Tenth Circuit. In the Tenth Circuit, a motion for reconsideration, even of an interlocutory order, which is *pending* on the date final judgment is entered, is deemed to be a Rule 59 motion, and the time for filing a notice of appeal runs from the date that motion is decided. *See, Hilst v. Bowen*, 874 F.2d 725 (10 Cir., 1989); *Director of Revenue v. United States*, 392 F.2d 307 (10 Cir., 1968).[5]

This Court should hear and decide the within appeal in order to resolve this conflict between the circuits.

II. THE COURT SHOULD GRANT THE PETITION AND SUMMARILY REVERSE THE COURT OF APPEALS' DECISION IN THIS CASE, BECAUSE THE RECOGNITION OF "IMPLICIT" DECISIONS ON RULE 59(e) MOTIONS RENDERS THE OPERATION OF RULE 4, F.R. APP. P., SUBJECT TO UNCERTAINTY AND MAKES IT IMPOSSIBLE FOR PARTIES TO KNOW WHEN TO FILE A NOTICE OF APPEAL

The second question presented by the within appeal is whether a motion pursuant to Rule 59(e), F.R. Civ. P., can be ruled upon by a trial court "implicitly." In the instant case, the district court entered final judgment while a Rule 59(e) motion was pending, without docketing a decision upon the motion, without rendering a

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[5] In the Tenth Circuit, a motion for reconsideration is not considered a motion to alter or amend a judgment under Rule 59(e) *only* where it is directed to a decision which does not completely dispose of *any* of the plaintiff's claims, and which, therefore, *cannot become* a final judgment. *See, Wagoner v. Wagoner*, 938 F.2d 1120 (10 Cir. 1991).

written decision upon the motion, and without even deciding the motion orally. The Court of Appeals, however, held that the trial court had "effectively" overruled the motion when the trial court completed the trial and entered final judgment. Thus, the within appeal presents the issue of whether the district courts must make written decisions on Rule 59 motions and must docket those decisions, or whether a district court may later be found to have overruled the motion, simply because it took action inconsistent with the relief requested in the motion.[6]

If this Court accepts the proposition that a Rule 59 motion may be "implicitly" overruled, then parties who seek to appeal from a final judgment will be forced to guess when to file their notice of appeal, because a notice of appeal must be filed within thirty days following the rendition of a decision on all Rule 59 motions. *See*, Rule 4(a)(1), Federal Rules of Appellate Procedure. This Court has consistently attempted to avoid that result by seeking "bright line" standards defining the events which trigger the requirement of filing a notice of appeal. *See, Osterneck*

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[6] According to the Court of Appeals, the fact that, subsequent to the filing of Plaintiffs' Motion for Reconsideration, the district court proceeded to implement its previous oral ruling dismissing the Petitioners' anti-trust claims demonstrates that the district court considered and overruled the Plaintiffs' Motion for Reconsideration.

Actually, this demonstrates no such thing. This sequence of events is equally consistent with the conclusion that the district court *never* considered the Plaintiffs' Motion for Reconsideration and simply ignored it.

v. Ernst & Whinney, 489 U.S. 169 at 176-177, footnote 3 (1989).

Under the rule adopted by the Court of Appeals in the instant case, Rule 59 motions may be ruled upon not only by entering a decision upon the docket, but also by taking action inconsistent with the relief requested in the motion. Thus, a court "effectively overrules" a Rule 59 motion by failing to alter or amend its judgment or by simply proceeding to enter the judgment which the Rule 59 motion seeks to change. The effect of the rule manufactured by the Court of Appeals in the instant case is to repeal Rule 4(a)(4), F.R. App. P., which precludes the filing of a notice of appeal until a ruling is actually made on all Rule 59 motions, and to repeal Rule 79, F.R. Civ. P., which requires all judgments and orders to be in writing and to be docketed.

CONCLUSION

For the foregoing reasons, the Petition should be granted and the decision of the Sixth Circuit summarily reversed.

Respectfully submitted,

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June 9, 1993

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APPENDIX A

Nos. 92-4306/4320/4373

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SILVER CLOUD, INC., d/b/a Columbiana Plastics; STEPHEN J. MOTOSKO, II, Plaintiffs-Appellees/ Cross-Appellants,	)	ORDER (Filed Mar. 18, 1993)
v.	)	
NATIONAL KITCHEN PRODUCTS; EDWARD J. MORRIS; Defendants-Appellees,	)	
QUIKUT, Division of Scott & Fetzer Company, Defendant-Appellant/ Cross-Appellee.	)	

BEFORE: KENNEDY and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

The defendant, Quikut, appeals the jury verdict and judgment in favor of the plaintiffs. (Case No. 92-4306). The plaintiff cross-appeals from earlier unfavorable rulings. (Case No. 92-4320). Quikut perfected a second appeal following the district court's disposition of plaintiffs' motion for prejudgment interest. (Case No. 92-4373). Defendant National Kitchen Products, an appellee in Case No. 92-4320, moves to dismiss that appeal on grounds that it was brought while a time-tolling motion

was pending. The plaintiff responds that all three appeals are premature, arguing that a motion to reconsider remains pending in the district court. Both National Kitchen Products and Quikut have replied in opposition to the plaintiff's response. Plaintiff has filed a supplemental response.

During trial of this matter, the district court directed verdict for the defendants on the plaintiffs' antitrust claims. Thereafter, the plaintiff filed a motion to reconsider, asking that those claims be submitted to the jury. The district court later submitted the case to the jury without the antitrust claims. A verdict was rendered for plaintiffs against the remaining defendant on a single count. Before a formal judgment had been entered on the verdict, the plaintiffs made a motion for prejudgment interest. Such a motion tolls the time for appeal. *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). Both the plaintiffs' appeal in Case No. 92-4320 and defendant Quikut's appeal in Case No. 92-4306 were filed while that motion was pending. Those notices of appeal are ineffective. Fed. R. App. P., 4(a)(4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam). Following disposition of the motion, Quikut perfected a second appeal, Case No. 92-4373, but the plaintiffs did not.

Only Case No. 92-4373 vests this court with jurisdiction. The motion to reconsider the directed verdict does not render these appeals premature, as the plaintiffs argue, because the motion was effectively denied when the district court submitted the case to the jury. Further, the motion sought reconsideration of a nonfinal ruling of the district court and not of the final judgment.

It therefore is **ORDERED** that the motion to dismiss Case No. 92-4320 is granted. Further, Case No. 92-4306 is dismissed *sua sponte* as premature. Case No. 92-4373 shall remain upon the court's docket.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

[Only 92-4306/4320
ISSUED AS MANDATE: April 13, 1993

COSTS: None

FILING FEE .....$
PRINTING.....$
TOTAL .....$

APPENDIX B

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

DISTRICT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

CASE TITLE
SILVER CLOUD INC., dba COLUMIANA PLASTICS & STEPHEN MOTOSKO, II

V.

NATIONAL KITCHEN PRODUCTS, et al.

DOCKET NUMBER
1:89CV1729
(Filed Oct. 14, 1992)

NAME OF JUDGE ~~OR MAGISTRATE~~
SAM H. BELL

X **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff recover from defendant Quikut the sum of $70,000.00.

IT IS FURTHER ORDERED that all remaining claims of plaintiff against all defendants are dismissed, with prejudice.

IT IS FURTHER ORDERED that the court's oral opinion of 30 September 1992 is hereby adopted in accordance with Fed. R. Civ. P. 52, and this judgment is hereby entered in accordance with Fed. R. Civ. P. 58, thus terminating this action in its entirety.

/s/ Sam H. Bell
SAM H. BELL, USDC JUDGE

DATE
13 October 1992

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC. dba COLUMBIANA PLASTICS and STEPHEN J. MOTOSKO, II Plaintiffs vs. NATIONAL KITCHEN PRODUCTS, ET AL Defendants	CASE NO. 1:89-CV-1729 JUDGE SAM H. BELL MOTION FOR RECONSIDERATION OF THE DIRECTED VERDICT DISMISSING PLAINTIFFS' ANTI-TRUST CLAIMS

Now come Plaintiffs, and hereby move this Court for reconsideration of its decision sustaining Defendants' Motions for Directed Verdicts with respect to the antitrust claims presented herein.

A Memorandum in Support of this Motion, as well as transcripts of pertinent portions of testimony presented at the Trial of this matter, are attached hereto and incorporated herein.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC. dba COLUMBIANA PLASTICS and STEPHEN J. MOTOSKO, II Plaintiffs vs. NATIONAL KITCHEN PRODUCTS, ET AL Defendants	CASE NO. 1:89-CV-1729 JUDGE SAM H. BELL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE DIRECTED VERDICT DISMISSING ITS ANTITRUST CLAIMS

For the reasons set forth below, Plaintiff respectfully states that the evidence presented at Trial raised more than sufficient issues material to its claims under Sections 1 and 2 of the Sherman Act to require that these claims be submitted to the jury for determination. Specifically, the record contains evidence upon which the jury could find a violation of Section 1 under both a *per se* and "rule of reason" theory of liability.[1]

Accordingly, Plaintiff requests this Court to vacate its order of a directed verdict and allow the jury to enter a verdict on these causes of action.

---

[1] This same evidence would support finding of liability for conspiracy to monopolize in violation of Section 2 of the Sherman Act.

DISCUSSION

A directed verdict should be granted only "if there is a complete absence of pleading or proof on an issue or issues material to the cause of action or where there are no controverted issues of fact upon which reasonable minds could differ." *Rockwell Interim Corp. v. Regional Emergency Medical Services of Northwest Ohio, Inc.*, 688 F. 2nd 29, 31 (6th Cir. 1982). When considering such a motion, a court views the evidence, and inferences therefrom, in a light most favorable to the party against whom the motion was made, "giv[ing] it the advantage of every fair and reasonable inference that the evidence can justify." *Id.*; Also see *Itersh v. United States*, 719 F. 2nd 873, 876-77 (6th Cir. 1983).

When viewed in such a light, the trial record here is replete with evidence from which it can be concluded that Plaintiff's agreement with Quikut was terminated in September of 1985 pursuant to an agreement between Quikut and Morris that violated Section 1 of the Sherman Act.

I. THE RECORD CONTAINS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND A PER SE VIOLATION OF SECTION 1.

PER SE

Although there is a general presumption for applying the rule of reason in antitrust cases, where the challenged agreement is between *direct competitors* and it results in an allocation of customers or territories, or a reduction in output, it should be properly considered under the *per se*

rule. See, for example, *United States v. Cooperative Theaters of Ohio*, 845 F. 2d 1367, 1371 (6th Cir. 1988), and *See also Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990). *Per se* illegal restraints are conclusively presumed to be unreasonable and illegal without elaborate inquiry of their effect on competition, and proof of market power is not required. *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 432-36 (1990); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982); and *Lie v. St. Joseph Hospital of Mount Clemens, Michigan*, 1992-1 Trade Cases (CCH) 69,833 (6th Cir. 1992).

The evidence derived at trial showed that at the time Quikut terminated its agreement with Plaintiff, providing for Quikut to be the exclusive distributor of the Motosko slicer, Quikut was a direct competitor, or potential competitor, of Defendant, National Kitchen Products, as distributors* in the sale of manually operated board slicers to pitchmen in the demonstration segment of the retail market. *There is absolutely no dispute in this regard.* Indeed, Edward Ellis testified that one of the reasons he met with Mr. Morris was to determine whether or not Quikut's introduction of a competing manual board vegetable slicer would injure the relationship between Quikut and National Kitchen Products.[2]

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* See Plaintiffs' Exhibit 13.

[2] A copy of the testimony of Mr. Ellis has not been prepared as of this moment. However, Mr. Ellis' Affidavit dated February 1, 1990 (which was attached to Quikut's original Motion for Summary Judgment) states: "in fact, at one point in time, I visited Ruby Morris at the offices of National Kitchen Products in New York and inquired as to whether the introduction by Quikut of the new slicing machine would hurt the relationship

Accordingly, far more than a scintilla of evidence exists upon which a jury could conclude that any agreement, or concerted action, between Quikut and National Kitchen Products was *horizontal* in nature. It also certainly would be reasonable for a jury to conclude, based on the record facts, that the competitive effect of any agreement between Quikut and National Kitchen Products was a "naked" restraint of trade, and therefore *per se* unlawful, in that it resulted in the effective exclusion of a competitive product from the market. *Palmer v. BRG of Georgia, Inc.*, 111 S. Ct. 401 (1990); *United States v. Topco Associates*, 405 U.S. 596 (1972); *United States v. Cooperative Theaters of Ohio*, 845 F. 2nd 1367 (6th Cir. 1988).

Moreover, although a showing of an unlawful intent is not required to establish a Section 1 claim where a presumptive anti-competitive effect has occurred,[3] the trial record here could also sustain the reasonable conclusion that both Quikut and National Kitchen Products harbored such an intent.

First, Mr. Morris conceded at trial that he complained to Quikut as a result of the presence of the Motosko Slicer at the Philadelphia Home Show in January 1985. Indeed, Morris states that he telephoned Quikut from Philadelphia, and both Stephen Motosko and Charles Motosko

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between Quikut and Mr. Morris or National Kitchen Products." Mr. Ellis' testimony at the trial of this matter was identical to the testimony in his Affidavit.

[3] *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978) ("[T]he general rule [is] that a civil violation can be established by proof of *either* an unlawful purpose *or* an anti-competitive effect") (Emphasis added).

testified that, as a result of that telephone call, Quikut forced the Motosko Slicer booth to be closed prior to the beginning of the show. Morris further testified that he complained to Quikut about the Motosko slicer as competition. (See Plaintiffs' Exhibit 1 attached hereto). From such testimony, a jury could *easily conclude that Mr. Morris had an improper anticompetitive motive.*

Further, a jury could conclude an improper motive by Quikut based on its desire to protect its demonstration business, which accounted for, at the time, twenty percent (20%) of its over all business.[4]

As Mr. Morris testified, the pitchmen market is a small close fraternity (See Plaintiffs' Exhibit 2 attached hereto), and Quikut's sales of its knives through this market, by Quikut's own testimony accounted for twenty percent (20%) of its over all sales volume. (See Plaintiffs' Exhibit 3 attached hereto.) Fearful that Morris could prevail on the small fraternity of pitchmen that buying Quikut knives was no longer appropriate, Quikut, it could be inferred, was willing to protect such sales by agreeing to preclude the Motosko slicer from seeing the light of day in the market place. (See testimony of Stephen J. Motosko, attached here to as Plaintiffs' Exhibit 4.)

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[4] Quikut and National Kitchen Products suggest that the conduct complained of herein makes "no economic sense". Yet, if Quikut truly did not care about the loss of Mr. Morris' demonstration sales purchases, then there would have been no reason for Edward Ellis, the National Sales Manager, to fly to New York City to meet with Mr. Morris to discuss "whether the introduction of the Motosko slicer would hurt the business relationship between Quikut and National Kitchen Products."

Further, David Bryant testified that he feared that "at any point in time any demonstrator should he choose" could have jumped into the knife/demonstrator business in competition with Quikut. (See Plaintiffs' Exhibit 5.)

Finally, and most importantly, Quikut's testimony is that three-fourths (3/4) of its demonstration business comes from its top ten customers, and that eight of those ten sell, among other things, vegetable slicers. Quikut's desire to not compete with those eight demonstrators, who presumably comprise several hundred thousand dollars of demonstrator business, makes enormous *economic* (See Plaintiffs' Exhibit 6 attached hereto.)

* * *

resulting from the complained of conduct. *International Logistics Group, Ltd. v. Chrysler Corporation*, 884 F. 2d 904, 907 (6th Cir. 1989).

RELEVANT MARKET

With respect to proof of the existence of a relevant product *and* geographical market, well established standards were set forth by the United States Supreme Court in *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962). There, the High Court stated that "the outer boundaries of a product market are determined by the reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes for it." The Court further stated, with respect to the geographical element of the relevant market mandate, that

the definition of a geographical market "must correspond to the commercial realities" of the industry. *Id.* at P. 336.[6]

Interestingly, at Footnote 4 of its initial denial of Defendants' Motions for Summary Judgment, this Court stated, at Page 13 of its Order, that "[i]n reality, Quikut's attack is limited to the first and second prongs of the test; it does not dispute that there exists a relevant market within which the alleged effects would occur."

RELEVANT PRODUCT MARKET

Regarding proof of the relevant product market alleged by plaintiff – manually operated board slicers, with a sub-market of such items sold by demonstrators, all across the United States – Defendants' own testimony may be relied upon. Quikut's witnesses and Mr. Morris testified of their recognition of a specific market segment of sales through pitchmen. This segment of the market was distinct from the general retail segment and others. (See Plaintiffs' Exhibit 7 attached hereto.) Such testimony from participants in the market, even without confirmation from "experts", could be relied upon by the jury in defining the parameters of the relevant market for this case.

Further record evidence assists in this regard. Specifically, facts of record would certainly permit the jury to conclude that a board slicer market is distinct from a

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[6] Notably, *neither* Defendant offered evidence or argument which could lead the Court to conclude that the geographical market is *anything but the United States.*

market containing a greater number of slicing implements, knives standing alone, for example. Not only did nearly every witness testify how knives and manual board vegetable slicers are distinguished from each other, no genuine effort was engaged upon by either Defendant to convince the jury that the relevant market was anything but manually operated board vegetable slicers.[7]

The *Brown Shoe* test, that the "outer boundaries of a product market are determined by the reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes for it", has alone been satisfied by the testimony referred to above as well as by Defendants failure to present any evidence whatsoever that a manual board vegetable slicer can be "interchanged" with any other product. *No evidence in this regard was submitted by Defendants.*

That notwithstanding, the economic testimony in this regard is also consistent with the defining of a separate market, satisfying the "cross-elasticity" option.

Mr. Morris testified that when the Motosko slicer was being sold at the Philadelphia Home Show in January 1986, no effect on his knife sales occurred. Nor did such an effect occur when the price for the Motosko slicer was lowered. (See Plaintiffs' Exhibit 8 attached hereto.) All of

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[7] While Defendants would have this Court believe that it is unclear what the relevant market is – as they urged at oral arguments on the Motions for a Directed Verdict – there is no genuine dispute in this regard. No evidence exists that knives and vegetable slicers do the same things (indeed, they do not), nor have the Defendants suggested that the relevant market is broader *or* narrower than the market urged by Plaintiffs.

these facts would permit the jury to conclude that there existed a lack of cross-elasticity between knife sales and slicer sales, specifically when sold through pitchmen.

Further, in 1987, the Morris slicer was sold for $10.00. In 1988, after the Motosko Slicer was impacted by Quikut's cut-off, the cost of the Morris slicer was raised to $20.00. Even though the Morris slicer package was enhanced, the driving force of the sale was, of course, the *vegetable slicer.* This increase, if knives and slicers were cross-elastic, would have had people running to buy knives instead of slicers. However, Morris' testimony verifies that his sale of knives through the period of the mid-1980's to the present remained constant, notwithstanding the increase in price for his slicers. (See Plaintiffs' Exhibit 9 attached hereto.)

Such a conclusion would place these products in separate relevant product markets.

GEOGRAPHICAL MARKET

As set forth above geographic markets must be drawn with an eye to the "commercial realities" of the industry. *Brown Shoe Co., supra,* at p. 336. The geographic market is the area of effective competition in which the "seller operates and to which the purchaser can practically turn for supply." *United States v. Philadelphia National Bank,* 374 U.S. 321, 361 (1963).

Thus, to properly define a proper relevant geographical market, one must look at patterns of supply; for example, if there is the same pricing in different markets and shipments are made from disparate locations in the

United States, the evidence would suggest a national market. Moreover, if consumers could switch their purchasing to products from different locations, a national market would be proper, especially in view of the evidence regarding demonstration television sales.[8] Therefore, all of the United States is clearly part of the geographic market because a person can buy a slicer on television as well as any other United States city. Evidence has established that the size of the market is the United States as established by the testimony of Morris and Quikut's David Bryant. (See Plaintiffs' Exhibit 11 attached hereto.) Further, the nature and the method of the sales are undisputedly established as pitch sales by the testimony of Morris, Quikut's David Bryant and Quikut's Marc Nagoshiner. (See Plaintiffs' Exhibit 12 attached hereto.)

Further, Mr. Morris' testimony can be relied upon to conclude that the geographic scope of this relevant market was national. As Mr. Morris testified, there are thousands of home shows, fairs, malls and flea markets across the country at which pitchmen sell items such as slicers. Mr. Morris wholesales to these pitchmen and, he, himself

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[8] Here, the geographic market is the United States, and the evidence establishes that products are shipped throughout the United States by suppliers. Pricing in the various markets is consistent, and the consumers (without physically traveling) can make purchasing decisions to switch to goods from a geographically distant place. Decision making based on television commercials shown nationally, and infomercials, affects sales at shows, thereby further evidencing a national geographic market. (See Plaintiffs' Exhibit 10 attached hereto.) In other words, competitive realities (i.e., the forces that control supply and demand) are national in scope.

participates in twelve (12) events annually held in disparate geographic locations in Wisconsin, Ohio, Massachusetts, North Carolina, Illinois, Pennsylvania and Michigan. Thus, a national relevant geographical market could certainly be found by the jury, especially when no evidence to the contrary was offered by any of the Defendants.

DEFENDANTS POWER IN THE MARKET

It also could be inferred from the record evidence that National Kitchen Products had market power in the relevant market for the sale of manual board slicers. First, testimony by Stephen Motosko showed that Mr. Morris acknowledged that his sales represented more than 80% of slicers sold during the relevant period. Second, Mr. Morris' market power could also be found on the evidence of his ability to raise the price for his slicer product by 100% after Quikut refused to distribute the Motosko slicer. Such an act is, certainly, indicative of a firm with market power. Thus, even if Defendants' urge a different view of the evidence, which they most certainly will, the Court is not to weigh the evidence, but to determine whether *any* issues exist and when the evidence is viewed most favorably to Plaintiff at a minimum, reasonable minds can certainly differ as to whether Morris had market power.

Finally, while Defendants vaguely suggested during the course of the Trial that there were "several" manual board slicers on the market, it was not until Marc Nagoshiner testified that, based on Quikut's own admissions, this was proven. Mr. Nagoshiner testified that Quikut considered, in approximately 1988, going into the

Slicer business. He stated that, in doing so, Quikut obtained all of the slicers on "the market and there were *only four*. Those four were the National Products' Combi-Chef,[9] the Boerner V-Slicer, and two versions of the Dial-amatic. And, Mr. Morris clearly testified that the V-Slicer was, at that time, distributed by National Kitchen Products (as, of course, was the Combi-Chef) and the Dial-amatic was off of the market. Clearly, this combined testimony, of Morris and Mr. Nagoshiner (the two Defendants' trial repres proves – even without the corroborating testimony which was given – that at the pertinent time period, the *only* manual slicers on the market were those distributed by National Kitchen Products. (See Plaintiffs' Exhibit 13 attached hereto)

ANTI-COMPETITIVE EFFECT

The price increase by National Kitchen Products also permits the inference of an anti-competitive effect in the relevant market, and more than just injury to a competitor. Specifically, whether Mr. Morris can justify the price increase or not based on new packaging and components does not detract from the fact that consumers had to pay twice as much for the same slicer after the Motosko slicer was effectively precluded from entering the market. A lower priced alternative, without the new packaging and components, was not available. Thus, whether consumers

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[9] The Court will recall that all of Plaintiffs witnesses testified that, in their travels across the United States (which included over 80% of the market), the only manual board slicers on the market were those distributed by National Kitchen Products. See, for example, testimony of Stephen Motosko, Richard Motosko, Richard Reese, James Frenier and Jack Crowther.

wanted just a slicer, or a slicer with new packaging and additional implements, they could only purchase the latter at a price twice as much as was paid for the slicer standing alone. This is exactly the type of anti-competitive effect agreement which the antitrust laws are designed to protect against, and the jury could reasonably find that based on the evidence in the record, such an effect was caused by Defendants' conduct.

Finally, under either a *per se* or rule of reason analysis, the evidence in the record establishes the basis for the jury to find that Quikut and National Kitchen Products acted in concert. The standard this jury would apply would be whether the evidence reasonably tended to prove a conscious commitment to a common scheme designed to achieve an unlawful objective. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). A formal or express agreement, however, is not required; a tacit understanding is sufficient. *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939). Indeed, even "[a] knowing wink can mean more than words." *Esco Corporation v. United States*, 340 F. 2nd 1000, 1007 (9th Cir. 1985).

As discussed above, both National Kitchen Products and Quikut had the economic motive to agree to exclude the Motosko slicer from the market. As outlined above, if Quikut did not care about the loss of Morris' demonstration sales purchases, then there would be no reason for the National Sales Manager to fly to New York City to meet with Mr. Morris to discuss whether the introduction of the Motosko slicer would hurt Quikut's business relationship with Morris. Moreover, David Bryant's fear that any demonstrator could have jumped into the knife/

demonstration business in competition with Quikut coupled with the fact that Mr. Morris was one of the top 3 knife purchasers, substantiates the magnitude of the economic ramifications. (See previous Plaintiffs' Exhibit 5.) This reality is coupled with the statistic that three-fourths of Quikut's demonstration business comes from its top ten customers, eight of which sell, among other things, vegetable slicers. This translates into potentially losing approximately $750,000 dollars of demonstrator business and makes enormous *economic sense*. (See previous Plaintiffs' Exhibit 6).

Moreover, the record contains significant evidence of communications between the Defendants, including Mr. Morris and Quikut's National Sales Manager, which were then followed by Plaintiff being told by Quikut not to show the Motosko slicer at the Philadelphia Home Show, and ultimately by Quikut's refusal to distribute the Motosko slicer to the demonstration market. For purposes of this Motion, such evidence should be sufficient to permit the jury to decide Plaintiff's claim under Section 1 of the Sherman Act.

In addition to evidence of conspiratorial conduct discussed above, attached hereto as Plaintiffs' Exhibit 14, is a segment of Stephen Motosko's testimony in which Mr. Morris provided him with an "example" of how he deals with his buyers and how Quikut "protects" him [Morris] in the same way. This testimony is explicit, and, notably, it was not disputed by Morris.[10]

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[10] This statement by Morris is accurate. Otherwise, the denial would have been impeached with the use of audio tape recordings, as previously authorized by the Court.

III. SUFFICIENT EVIDENCE IS IN THE RECORD TO RAISE ISSUES ON PLAINTIFFS' CONSPIRACY TO MONOPOLIZE CLAIM

The same evidence as compels allowing the jury to decide Plaintiff's Sherman Act Section 1 claim, also requires that the jury should be permitted to render a verdict on its conspiracy to monopolize claim under Section 2 of the Sherman Act. The elements of this cause of action are concerted activity, specific intent to monopolize and an overt act done in furtherance of the conspiracy. *Advanced Health Care Services, Inc. v. Radford Community Hospital*, 910 F. 2nd 139, 150 (4th Cir. 1990); *Volvo North American Corporation v. Men's Inter. Professional Tennis Council*, 857 F. 2nd 55, 74 (2nd Cir. 1988); *Dreiling v. Puegot Motors of America, Inc.*, 850 F. 2nd 1373, 1382 (10th Cir. 1988); *Great Escape, Inc. v. Union City Body Co.*, 792 F. 2nd 532, 540-41 (7th Cir. 1986).

Here, more than a scintilla of evidence existing [sic] to support each of these elements. Concerted activity, and the over acts that followed therefrom (Quikut's refusal to distribute the Motosko slicer and its later refusal to sell its AN 800 knives to demonstrators that did sell that slicer), are discussed above. And, from such conduct, the existence of specific intent may be inferred. *National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories*, 850 F. 2nd 904, 915 (2nd Cir. 1988); *Richter Concrete Corporation v. Hilltop Concrete Corporation*, 691 F. 2nd 818 (6th Cir. 1981).

Accordingly, the jury should be permitted to render a verdict on Plaintiff's Section 2 Conspiracy to Monopolize claim.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that the Court should, upon reconsideration, vacate its directed verdict dismissing Plaintiff's antitrust claims.

Respectfully Submitted,

/s/ Michael Morley
MICHAEL MORLEY - 0021154
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was hand delivered this 5th day of October, 1992, to RICHARD E. GUSTER, ESQ., 50 South Main Street, Akron, Ohio 44308; and GEORGE W. ROONEY, ESQ., 75 East Market Street, Akron, Ohio 44308.

/s/ Michael Morley
MICHAEL MORLEY - 0021154
Attorney for Plaintiffs

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC.,	)	
Plaintiff,	)	
vs.	)	Civil Action No.
NATIONAL KITCHEN PRODUCTS, et al., and QUIKUT DIVISION OF SCOTT FETZER CO.	)	1:89CV1729
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE SAM H. BELL, JUDGE OF SAID COURT, ON WEDNESDAY, SEPTEMBER, 30, 1992 AT 5:30 O'CLOCK P.M.

APPEARANCES:

For the Plaintiff:	MICHAEL MORLEY, ESQ. 721 Boardman-Poland Road Youngstown, Ohio 44513-3965
For the Defendant Quikut:	RICHARD E. GUSTER, ESQ. Thompson, Hine & Flory 50 S. Main Street Akron, Ohio 44308
For the Defendant National Kitchen Products:	GEORGE W. ROONEY, JR. Roetzel & Andress 75 E. Market Street Akron, Ohio 44308

Court Reporter: Richard G. DelMonico
U.S. District Court
2 South Main Street -
Room 588
Akron, Ohio 44308
(216) 535-1823

[p. 2] THE COURT: This case has been difficult in many respects because it has posed problems, in my mind, in a number of areas. So let me state these matters to you for the purpose of the record, and then we can go from there.

The court has considered the arguments of counsel concerning the motions made for judgment at the completion of all the evidence to be produced in this case. As to the claim of contract violation brought by the plaintiff against defendant Quikut, the motion is denied.

As to the anti-trust contentions brought by the plaintiff against defendants Quikut and Morris, the motions are sustained.

Two common elements are inherent in each of the claims brought under the powere [sic] of the anti-trust violation sections. One pertains to proof of a conspiracy either to monopolize the market or restrain trade; and the other implicates questions inherent in the necessity of proving relevant market.

Because I cannot view the end result between Quikut and Morris, if any existed, as being driven by an intent to manipulate a market, I believe the issue of conspiracy to monopolize or restrain trade to be insufficiently proven to warrant its consideration by the [p. 3] jury.

To prove a party's intent to monopolize or restrain trade, one must prove such results to be the object or goal of the party's intent as expressed by the agreement in question. This includes the power to control prices or exclude competition from that segment of commerce.

Here we speak of competition generally and not such as involves but a single competitor. Because the evidence discloses here little or nothing about the nature and interplay of the slicer demonstration market, it would leave the jury in a position where it might only speculate as to the intent because it would be unable to define either of the goals spoken of.

As to relevant market, I believe the evidence or lack of evidence offered places the court in a position of saying that it, the evidence, is insufficient to preclude the jury from arriving at a verdict based on speculation alone, rather than a rationale consideration of fact and opinion upon which a verdict could be predicated on this issue.

No testimony was offered concerning a meaningful quantification of the market, its size, its nature, its functional interplay with the product choices, price, method of sale and other factors.

[p. 4] From the evidence offered it is my opinion that the jury would be unable to determine relevant market as to both product and geographic areas. More specifically, there is no evidence which would allow the trial jury to do more than speculate on the issue of market power, a key ingredient in the analysis required by the determiners of fact.

I would add that as to the conspiracy to restrain trade claim, the jury cannot, on the basis of the evidence adduced, conclude that the conspiracy, if it existed, produced substantial adverse anti-competitive effects.

For this reason, then, I believe the rationale answer is that the claims against Mr. Morris are dismissed. There is a remaining claim of contract violation, I believe, against Quikut.

I should add, incidentally, that I find no evidence in the record which impacts on my thought that damage was done to Mr. Motosko as the holder of the patent. I have viewed that, as I indicated to you, as a property right and none of the evidence here would indicate to me that that, as a right, has been effective.

So we'll see you, some of you tomorrow morning, is that correct?

MR. GUSTER: That's correct. 9:00 o'clock,

APPENDIX E

Partial Transcript of Proceedings, October 1, 1992

[p. 13] because I want to review it.

You have seen it?

MR. MORLEY: Yes.

MR. GUSTER: I would be glad to do that. And then in your absence we can just list the exhibits to the reporter.

THE COURT: Yes, that will be swell. And whatever they agree on there, I'll admit into the record. And we'll see you on Tuesday.

MR. MORLEY: I know you are running to Cleveland.

THE COURT: It's okay.

MR. MORLEY: It's my intention on the court's ruling, to file a motion for reconsideration on the court's decision as of yesterday.

THE COURT: Yes.

MR. MORLEY: If I do that, I will do that shortly, certainly by Monday at 8:30 in the morning at the latest. Because if the court were to reconsider, I think that there is a jury that's waiting to be called and George Rooney would have to be involved as well. And I wanted the court to be aware of that among other things, we believe that a horizontal inquiry should be made as a result of the fact that Quikut and Morris, apparently in the court's view, were manufactures [sic] and thus horizontal [p. 14]

inquiry should be made. But various reasons will be set forth.

My client does want –

THE COURT: You mean now as opposed to before? Because we did make that inquiry previously, you recall.

MR. MORLEY: Yes, your Honor, I understand that. And that will not be the primary trust of the motion for reconsideration frankly.

THE COURT: Well, there is another issue so we are all sure then, we now have these pending claims, state claims. I assume there is no objection to my going forward with the contract claim.

MR. MORLEY: I don't have an objection with the court going forward with the contract claim, of course. But I would like the court to consider the motion for reconsideration before that.

THE COURT: Oh no, I'm not saying that.

MR. MORLEY: I'm sorry.

THE COURT: The jurisdiction of the court now is a question by reason of the rulings.

No, if there is one thing I've attempted to do in this case is give full consideration to everything you folks have said, and I most assuredly will do that again.

But strategically, sometimes this is a problem and I want to throw it out to you because – so you know [p. 15] what it is.

MR. MORLEY: I don't have a problem with this proceeding and doing it here at this point.

Do you have –

MR. GUSTER: Well, I normally don't like to consent to jurisdiction in any circumstance and –

THE COURT: I'm not asking you to consent to anything. We have gone this far, I'll finish the case. If there is some reason why I should not, that may change Mike's view as to how he proceeds, because certain things here have not yet been done. I don't want to belabor the point, I'm just raising the issue now so that its part of the record. Because theoretically I could not try these alone without the aegis of the anti-trust federal jurisdiction.

MR. GUSTER: The justification, of course, for the contract claim was the pending or ancillary jurisdiction of the court.

THE COURT: Well, I think it was. I think it was.

MR. GUSTER: It was so alleged and I think that's the classic situation. That's the only justification for the state claim.

MR. MORLEY: That's how it was alleged.

MR. GUSTER: And especially so because of

FILED
JUL 7 1993
OFFICE OF THE CLERK

No. 92-1967

In The

Supreme Court of the United States

October Term, 1993

SILVER CLOUD, INC. d/b/a COLUMBIANA PLASTICS; and STEPHEN J. MOTOSKO, II,

Petitioners,

v.

NATIONAL KITCHEN PRODUCTS, EDWARD J. MORRIS and QUIKUT, A DIVISION OF THE SCOTT FETZER COMPANY,

Respondents.

Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents submit that two questions are presented for review, as follows:

1. In a case involving multiple claims for relief and the granting by oral opinion of a motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) in favor of defendants, which ruling adjudicates fewer than all the claims and the rights and liabilities of fewer than all the parties with no express determination pursuant to Fed.R.Civ.P. 54(b), whether a "Motion for Reconsideration" filed by plaintiffs after such oral opinion and before submission of the case to the jury specifically requesting that the District Court submit the adjudged claims to the jury, constitutes a motion filed pursuant to Fed.R.Civ.P. 59(e) so as to suspend, pursuant to Fed.R.App.P. 4(a), the time for filing a notice of appeal;

2. Whether such a "Motion for Reconsideration" remains pending even after the District Court (a) submits the case to the jury without the previously adjudged claims; (b) instructs the jury without objection from plaintiffs that the previously adjudged claims have been resolved and are not before the jury for its consideration, and (c) thereafter enters final judgment expressly adopting its prior oral decision, when plaintiffs themselves filed two notices of appeal following such final judgment.

CORRECTED LIST OF PARTIES

All parties are listed in the caption. However, Petitioners incorrectly identified Respondent National Kitchen Products as a corporation wholly owned by Respondent Edward J. Morris when, in fact, National Kitchen Products is a sole proprietorship under which Respondent Edward J. Morris conducted business.

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Rule 54(a), Fed.R.Civ.P. 3, 9

Rule 54(b), Fed.R.Civ.P. 3, 8, 9, 13

Rule 58, Fed.R.Civ.P. 5, 8

Rule 59(e), Fed.R.Civ.P. ..... *passim*

No. 92-1967

In The

Supreme Court of the United States

October Term, 1993

SILVER CLOUD, INC. d/b/a COLUMBIANA PLASTICS; and STEPHEN J. MOTOSKO, II,

Petitioners,

v.

NATIONAL KITCHEN PRODUCTS, EDWARD J. MORRIS and QUIKUT, A DIVISION OF THE SCOTT FETZER COMPANY,

Respondents.

Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

National Kitchen Products ("NKP"), Edward J. Morris ("Morris") and Quikut, a division of The Scott Fetzer Company ("Quikut"), hereby jointly oppose the Petition for Writ of Certiorari.

Respondents submit that only after Petitioners made the fatal mistake of failing to file a third and timely notice of appeal following the District Court's ruling on their own time-tolling motion, after having previously filed two premature and ineffective notices of appeal (a mistake Petitioners acknowledged to the Court of Appeals),

did Petitioners conjure up the issues which they now present to this Court, both of which were soundly rejected by the Court of Appeals.

Respondents submit that there exists no special or important reason for this Court to grant the petition for a writ of certiorari.

OPINIONS AND ORDERS BELOW

In addition to those referenced by Petitioners, Respondents include the following:

During a chambers conference on October 6, 1992, before the case was submitted to the jury, the District Court advised that it would not change its ruling regarding the directed verdict (Appendix A hereto).

The District Court, as a part of its charge, instructed the jury that "the antitrust issues have been resolved" (Appendix A hereto).

The Court of Appeals entered its decision dismissing the Petitioners' First Notice of Appeal on December 8, 1992 (Appendix B hereto).

On December 11, 1992, the District Court issued its marginal entry order, dated December 9, 1992, denying plaintiffs' Motion for Prejudgment Interest (Appendix C attached hereto).

STATUTES AND RULES INVOLVED

In addition to the rules cited by Petitioners, this case involves the following rule:

Fed.R.Civ.P. 54 provides:

(a) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STATEMENT OF THE CASE

Petitioners have made several misstatements in, and material omissions from, their Statement of the Case. Respondents accordingly submit the following corrections and additions.

Contrary to the statement of Petitioners, Morris through his company NKP was *not* the nation's only existing supplier of manually-operated vegetable slicers to the demonstration market, and Morris was *not* one of Quikut's largest knife customers. Indeed, Morris' purchases represented only approximately 2% of Quikut's annual sales.

By oral opinion issued on September 30, 1992, the District Court granted Respondents' Motion for Directed Verdict as to the antitrust claims and denied Respondent Quikut's Motion for Directed Verdict as to the contract claim. After Petitioners filed their Motion for Reconsideration on October 5, 1992, the District Court (Sam H. Bell, J.) advised orally during a chambers conference on October 6, 1992, before the case was submitted to the jury, that "I'm not going to change the ruling." (See Appendix A hereto – excerpts of Transcripts of Proceedings on October 6, 1992, at p. 3).

Judge Bell's statement followed a general reference to his ruling on both motions for directed verdict. A discussion then ensued regarding the manner in which the dismissal of the antitrust claims would be explained to the jury (Appendix A hereto at pp. 4-5). Specifically, Judge Bell proposed to counsel the following statement:

> During the period of your absence, the antitrust issues have been resolved. They will not be before you for your consideration. *Id.*

Counsel for Petitioners did not object to such statement. *Id.*

Thereafter, Judge Bell instructed the jury, giving that precise statement. *Id.* at 6. Following the jury instruction, Judge Bell expressly invited any additions or corrections from counsel. Counsel for Petitioners had "nothing further." *Id.* at 7.

Following the October 7, 1992 jury verdict, Petitioners filed their Motion for Prejudgment Interest (Docket Entry 159).

On October 14, 1992, Judge Bell entered final judgment, expressly adopting the oral opinion of September 30, 1992 and entering judgment in accordance with Fed.R.Civ.P. 58, "thus terminating this action in its entirety." (Docket Entry 163 and Appendix B to Petition for Writ of Certiorari).

On October 17, 1992, Respondent Quikut filed its Motion for Judgment as a Matter of Law, or, alternatively, for a new trial (Docket Entry 166). While Quikut's motion was still pending, Petitioners filed their first Notice of Appeal on November 12, 1992 (Docket Entry 172, see Appendix D hereto). The Sixth Circuit Court of Appeals *sua sponte* dismissed that appeal by Order filed December 8, 1992, as being premature (Appendix B hereto). Thereafter, on November 16, 1992, Judge Bell filed and issued his Order denying Quikut's Motion (Docket Entry 171).

While Petitioners' Motion for Prejudgment Interest was still pending, they filed their second Notice of Appeal on December 7, 1992 (Docket Entry 178). On December 11, 1992, Judge Bell issued its marginal entry order, dated December 9, 1992, denying Petitioners' Motion for Prejudgment Interest (Appendix C hereto).

Petitioners failed to file a Notice of Appeal after December 11, 1992.

REASONS WHY REVIEW SHOULD NOT BE GRANTED

This action involves neither a split of authority among the Circuit Courts of Appeals, nor any departure by the Court of Appeals from the accepted and usual course of judicial proceedings, or the sanctioning of any such departure by the District Court. Thus, none of the reasons set forth in Rule 10.1 of the Supreme Court Rules is present here and, therefore, the petition for Writ of Certiorari should be denied.

Rather than a conflict among the Circuit Courts of Appeals as suggested by Petitioners, the decisions by the Circuit Courts of Appeals are consistent and are merely distinguishable on the basis of the varying fact patterns, which heavily drive the determination as to whether a "Motion for Reconsideration" constitutes a Motion to Alter or Amend a Judgment pursuant to Fed.R.Civ.P Rule 59(e).

In addition, Petitioners' present expression of confusion as to the finality of the judgment entered in this case is nothing more than a desperate afterthought, created

after they realized their fatal mistake of not filing a Notice of Appeal after the ruling on their own Motion for Prejudgment Interest, despite this Court's clear and unequivocal pronouncement in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). Moreover, any professed confusion by Petitioners was of their own making.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

Petitioners have, in the first instance, mischaracterized the issue before this Court. Petitioners have erroneously characterized the "Motion for Reconsideration" below as a "Motion to Alter or Amend a Judgment." In fact, it was no such thing, which was one reason the Sixth Circuit Court of Appeals rejected Petitioners' argument below, and dismissed their second appeal as untimely. This very issue – whether a "Motion for Reconsideration" constitutes a Rule 59(e) motion – has been essentially uniformly analyzed by various Circuit Courts of Appeals, with different results driven by different factual scenarios. This is no different from the different outcomes resulting from the uniform application of *any* legal principle to differing fact scenarios.

Petitioners correctly point out that the Federal Rules of Civil Procedure make no provision for a "Motion to Reconsider," citing to *McDowell v. Dynamics Corp. of America*, 931 F.2d 380 (6th Cir. 1991), and *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979). What Petitioners do *not* point out is that those two decisions, by the Sixth Circuit itself, reached different results as a result of the different factual scenarios involved. *Smith, supra*, involved the grant of a

motion for summary judgment which terminated the litigation, subject only to the formal entry of judgment pursuant to Rule 58. Plaintiffs moved to "reconsider and vacate" prior to the formal entry of final judgment, which motion was treated by the District Court as a Rule 59(e) motion.

In the more recent decision in *McDowell, supra*, however, the Sixth Circuit reached a different result because of the different facts. Defendant had filed a "motion for reconsideration," requesting the District Court to reconsider its decision to set aside summary judgment. The Sixth Circuit noted that, "[a]lthough motions for reconsideration are often treated as Rule 59 motions, appellant's motion was not one that is contemplated by Rule 59." *Id.* at 382. The Sixth Circuit, after dissecting the relief requested, concluded that because the "motion for reconsideration" was not a motion for a new trial and there was no judgment that could be altered, defendant's Motion was *not* a Rule 59 motion.

It is undisputed that, in this case, the September 30, 1992 oral ruling of the District Court, granting a directed verdict on the antitrust claims but leaving the contract claim for submission to the jury, was an interlocutory decision governed by Fed.R.Civ.P. 54(b). The District Court did not direct the entry of a final judgment by an "express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Therefore, the directed verdict on the antitrust claims clearly was not a "judgment," expressly

defined in Fed.R.Civ.P. 54(a) as "a decree and any order from which an appeal lies."[1]

Instead, the directed verdict was an "order or other form of decision [which] is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b), *supra*. The Motion for Reconsideration below was clearly a *Rule 54(b)* motion for revision of an interlocutory order and, equally clearly, not a *Rule 59(e)* motion to alter or amend a nonexistent judgment.

Moreover, it is undisputed that the District Court did not view the Motion for Reconsideration as a Rule 59(e) motion, or treat it as such. Rather, the District Court proceeded in the October 14, 1992 final judgment entry to reaffirm expressly the oral opinion directing a verdict on the antitrust claims and thereafter to dispose of Quikut's Rule 59(e) motion on November 16, 1992, and plaintiffs' Rule 59(e) Motion for Prejudgment Interest on December 11, 1992.

Petitioners argue that the Sixth Circuit decision below conflicts with decisions by the Tenth Circuit, citing *Hilst v. Bowen*, 874 F.2d 725 (10th Cir. 1989), and *Director of Revenue v. United States*, 392 F.2d 307 (10th Cir. 1968). There is, however, no such conflict.

In *Hilst, supra*, prior to entry of formal judgment, plaintiffs moved for reconsideration of an order granting defendant's motion to dismiss the entire action. The District Court appropriately concluded that the motion for

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[1] Thus, as in *McDowell, supra*, there was no "judgment" for the District Court to alter.

reconsideration of the dismissal, which was a final judgment, was a Rule 59(e) motion, and the Tenth Circuit affirmed.

The Tenth Circuit's decision in *Hilst, supra,* is entirely consistent with the Sixth Circuit's decision in *Smith, supra.* Both decisions involved a "final judgment," awaiting only a formal entry pursuant to Rule 58. Neither decision involved an interlocutory order, as is present in the instant case. Indeed, the Tenth Circuit in *Hilst, supra,* expressly distinguished the interlocutory judgment as follows:

> The case of *Stephenson v. Calpine Conifers, II, Ltd.*, 652 F.2d 808 (9th Cir. 1981), cited by defendant, is factually distinguishable. There the district court denied motions to reconsider grants of partial summary judgments without ever ordering entry of judgment in favor of the parties obtaining partial relief. That case raised peculiar issues of finality under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1291, which are not present here.

Hilst, supra, 874 F.2d at 726 n.2.

Since the instant action involved a motion for reconsideration of an interlocutory order, a situation which *Hilst* expressly distinguished, *Hilst,* by its own definition, is distinguishable from, and not in conflict with, the Sixth Circuit decision below.

The Tenth Circuit decision in *Director of Revenue, supra,* is likewise distinguishable from the instant action. In that case, a motion for rehearing or new trial was filed, again from a final judgment which had not yet been formally entered. The District Court treated the motion as a Rule 59 motion and, after the entry of final judgment,

proceeded to consider and deny the motion for rehearing or new trial. Not surprisingly, the Tenth Circuit determined that the District Court did not err in so doing. In its analysis, the Tenth Circuit emphasized that, " '[w]here the court has power to further review its judgment, it cannot be said that the judgment is final as long as it is being considered by the Court.' " *Id.* at 309. The Tenth Circuit also considered the decisions of the Ninth Circuit in *Agostino v. Ellamar Packing Co.*, 191 F.2d 576 (9th Cir. 1951), and of the Eighth Circuit in *Cohen v. Curtis Publishing Co.*, 333 F.2d 974 (8th Cir. 1964), and concluded "that each of these cases is distinguishable upon its own peculiar facts." *Id.* at 309-310.

In *Agostino*, the Ninth Circuit held that a motion to reconsider based upon arguments as to the law applicable to the case "was in effect denied by the findings of fact, conclusions of law and judgment entered after the motion to reconsider was filed." *Id.* at 577. The Ninth Circuit expressly held that "the denial of a motion need not be express but may be implied." *Id.* at 577. Similarly, in *Cohen, supra*, the Eighth Circuit concluded that plaintiffs' motion for reconsideration, through which plaintiffs sought to delete a word from an order, was effectively denied by the subsequent entry of final judgment based specifically upon the prior order. The Eighth Circuit held that the final judgment was "an approval of such order and a denial of plaintiff's request to amend by the deletion of the word 'wrongfully'. It impliedly and effectively denied plaintiff's motion." *Id.* at 977.[2]

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[2] The same result obtains in the Seventh Circuit. In *Dunn v. Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991), the Seventh

The Tenth Circuit's decision in *Director of Revenue, supra,* is significant both because it recognizes that factually different decisions are distinguishable – as opposed to being in conflict – and because the decisions it found to be factually distinguishable are factually similar to the instant action. Thus, as in *Agostino,* the relief requested in the instant action by Petitioners' Motion for Reconsideration (*i.e.*, to allow the antitrust issues to be submitted to the jury) was effectively overruled when the District Court refused to allow the antitrust issues to go to the jury. And, like in *Cohen, supra,* the final judgment entered on October 14, 1992 expressly referred to, reaffirmed and adopted the September 30, 1992 oral opinion, which was the subject of Petitioners' Motion for Reconsideration. Finally, unlike the situation in *Director of Revenue, supra,* the District Court did *not* treat Petitioners' Motion for Reconsideration as a Rule 59(e) motion.

The foregoing discussion demonstrates that the issue presented by Petitioners is a fact-driven issue; the Circuit Courts of Appeals readily recognize that factually distinguishable features lead to differing results; and the decisions based on facts similar to the instant action are, in fact, entirely consistent with the decision of the Sixth Circuit reached below. There is no "conflict" among the Circuit Courts of Appeals as asserted by Petitioners and,

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Circuit concluded that a pre-judgment motion for new trial is essentially denied by the filing of the judgment thereafter. The Seventh Circuit noted that "any other approach produces a morass." *Id.* at 313. Emphasizing the need for simplicity and clarity, the Seventh Circuit cautioned that "[t]he only hope of fulfilling these goals, lies in treating the judgment as denying pending Rule 59 motions." *Id.*

therefore, the Petition for Writ of Certiorari should be denied.

Moreover, Petitioners' Motion for Reconsideration was a Rule 54(b) motion for revision of an interlocutory order, and *not* a Rule 59(e) motion to alter or amend a nonexistent judgment. However, even if the Motion for Reconsideration were properly deemed a Rule 59(e) motion, the same was effectively – indeed, virtually expressly – denied upon the subsequent entry of the final judgment on October 14, 1992, which expressly adopted the directed verdict.

II. THE COURT SHOULD NOT GRANT THE PETITION, SINCE THE DECISIONS ARE CLEAR AND PETITIONERS' PROFESSED "CONFUSION" IS A MERE FABRICATION.

Once again, Petitioners beg the question by assuming that the Motion for Reconsideration below was a Rule 59(e) motion. It was not.

However, addressing the substance of Petitioners' argument, it is important to review its context. This begins with a consideration of *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), which clearly and unequivocally held that a motion for prejudgment interest is a Rule 59(e) motion. Thus, both notices of appeal filed by Petitioners prior to the December 11, 1992 denial of their Motion for Prejudgment Interest were of no effect. Apparently overlooking *Osterneck, supra*, Petitioners committed the fatal mistake of failing to file a Notice of Appeal after the December 11, 1992 decision. Only when Respondents moved to dismiss Petitioners' appeal did Petitioners seize

upon their "Motion for Reconsideration" in a desperate attempt to avoid the obvious consequences of their clear mistake.

Petitioners' now-professed "confusion" is not only unsupported by the record, but is belied by their very conduct below. Indeed, the following obviated any "confusion" concerning the District Court's action:

(1) The case law discussed above, all of which is entirely consistent with the Sixth Circuit decision below;

(2) The colloquy which preceded the submission of the case to the jury, during which the trial judge stated he would not change his ruling and obtained the approval of all counsel of a statement to the jury that "the antitrust issues have been resolved";

(3) Petitioners' counsel did not object to or otherwise protest such statement, either before or after the jury was charged;

(4) The case was submitted to the jury without the antitrust issues, contrary to the specific relief sought in the Motion for Reconsideration;

(5) The October 14, 1992 Judgment Entry expressly ordered that "all remaining claims of plaintiff against all defendants are dismissed, with prejudice;" and

(6) The October 14, 1992 Judgment Entry *further* ordered that "the court's oral opinion of 30 September 1992 is hereby adopted in accordance with Fed. R. Civ. P. 52, and this judgment is hereby entered in accordance

> with Fed. R. Civ. P. 58, thus terminating this action in its entirety."

Under such circumstances it is difficult to understand how Petitioners could now argue that their Motion for Reconsideration of the directed verdict, which requested that the antitrust issues be submitted to the jury, could conceivably remain pending after the October 14, 1992 Judgment Entry. As if it were not clear enough from the language that "all remaining claims of plaintiff against all defendants are dismissed, with prejudice," the District Court made it perfectly clear that it was not further entertaining the antitrust issues by then expressly adopting the September 30, 1992 oral opinion, which dismissed such claims.

Beyond that, however, Petitioners simply were *not* confused[3] about the Motion for Reconsideration, and they have so demonstrated by their own conduct. Thus, on November 12, 1992, Petitioners filed their first Notice of Appeal "from the final judgment in this case (and the decisions of the Court incorporated therein) entered on October 14, 1992 (Appendix D hereto)."

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[3] Of course, Petitioners are directly responsible for the "confusion" of which they now complain. It was they who: filed the "Motion for Reconsideration," which is nonexistent under the Federal Rules; sat silently while the District Court advised the jury that the antitrust issues were resolved; filed the time-tolling Motion for Prejudgment Interest; did not file a new trial motion; and filed two premature notices of appeal during the pendency of time-tolling motions. In essence, it is the effect of Petitioners' own actions which Petitioners now claim to be confusing. Moreover, Petitioners' claimed "confusion" is a mere fabrication, as discussed more fully herein.

Plaintiffs had prematurely filed the first notice of appeal because Quikut's post-trial motion was clearly a time-tolling motion under Rule 59. On November 16, 1992, Quikut's motion was denied. Petitioners then apparently realized that their first Notice of Appeal was premature. Hence, they filed their second Notice of Appeal on December 7, 1992. Almost simultaneously, the Sixth Circuit issued its *sua sponte* order on December 8, 1992 (Appendix B hereto), dismissing the first appeal as premature because of Quikut's prior time-tolling motion.

Two matters are clear from these activities: First, Petitioners were themselves aware, and were also subsequently made expressly aware by the Sixth Circuit, that a Notice of Appeal filed during the pendency of a time-tolling motion such as under Rule 59, is premature and of no effect. Second, Petitioners well knew that their Motion for Reconsideration was *not* a time-tolling Rule 59(e) motion and/or had been previously denied, since otherwise there was no reason whatsoever for Petitioners to have filed the *second* Notice of Appeal.

Plainly and simply, Petitioners were not confused about the status of the Motion for Reconsideration. They well knew that the Motion for Reconsideration, if not denied during the pre-jury submission colloquy on October 6, 1992 or by the submission of the case to the jury without the antitrust issues, was clearly laid to rest by the October 14, 1992 Judgment Entry. Thus, the issue now presented by Petitioners to this Court is a mere fabrication, submitted in a desperate attempt to overcome their fatal failure to file a timely Notice of Appeal. This Court

should not countenance a fabricated issue and a pretended conflict as a basis for granting the petition for review herein.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC, Plaintiff, vs. NATIONAL KITCHEN PRODUCTS AND QUIKUT DIV. OF SCOTT FETZER CO, Defendants.	)	Civil No. 1:89CV1729 (Filed Feb. 18, 1993)

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE SAM H. BELL JUDGE
OF SAID COURT, AND A JURY ON OCTOBER 6, 1992

APPEARANCES:

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Recorded by mechanical stenography; transcript prepared by computer-aided transcription.

* * *

[p. 5] MR. GUSTER: Wasn't gone into by me, your Honor. I just don't see how it could be probative. It's so long after the termination of the contract and the term of the contract.

MR. MORLEY: I'm just assuming, maybe I'm wrong, that attorney Guster is going to argue that Mr. Motosko's vegetable slicer is, when it was presented to them, was not a workable, marketable, safe, salable item. Maybe I'm wrong.

THE COURT: The vegetable slicer, I presumed that would be one of your arguments.

MR. GUSTER: Of course.

THE COURT: The vegetable slicer itself is simply the plastic body of it.

MR. MORLEY: That's what was sold.

THE COURT: And this you would suggest that even though it was sold after the termination of the contract it was still the same plastic product, merchantable, just as it was prior to the termination of the contract.

MR. MORLEY: No question about that.

THE COURT: Okay, I'll admit 35. I see no reason to not admit the Ginsu knife.

(Off the record discussions)

MR. GUSTER: At the end of Plaintiff's opening [p. 6] statement I moved for directed verdict on the grounds there had been no cause of action stated with respect to the breach of contract. And I continue to adhere to that position. Recall that as originally cast the breach of contract claim as pleaded suggested that we, that Quikut had breached the contract and that by reason of the alleged conspiratorial action the contract was interfered with and breached by the defendants Morris and Quikut.

Your Honor's ruled on the motion for directed verdict as to the antitrust claims. The case no longer has that aspect of conspiracy with respect to the contract. And I will adhere to my former position that there was no statement of claim made in the opening statement and no breach of the contract alleged or stated.

THE COURT: Well, I'm not going to change the ruling.

MR. GUSTER: I understand. I want to make the record, your Honor. (pause) May I have an objection to page 108 about the expert testimony.

THE COURT: Sure. I'm going to leave it in.

MR. MORLEY: Webster Harpman testified and mainly about the invention.

THE COURT: Yes; that's why I left it in.

MR. GUSTER: With that exception, your Honor.

THE COURT: Everything is in there that you

* * *

[p. 10] And in any event, I think from a speculation standpoint it isn't speculative. Our argument is that the market was 300,000 a year and that is based exclusively, exclusively on Quikut's market research.

MR. GUSTER: Your Honor, Mr. Morley is trying to amend the contract to include language that he suggests is an agreement in addition that Mr. Motosko proposed at the time of its execution. The contract precludes, its express terms preclude the addition of any such requirement. The only requirement in this contract was to purchase 50,000 units a year in a two year period. At the end of the first period, 50,000 had not been purchased it became a non-exclusive agreement.

MR. MORLEY: I'm not making myself clear. I'm not saying that Quikut would have had to purchase 300,000 a year thereafter, but the result of the marketing would have been that demonstrators across the United States would purchase 300,000 a year, and Mr. Motosko has testified that he had those production capabilities.

THE COURT: Let me think about it for a couple minutes. Two other things I'd like to suggest to you. I would like – I think it may be advantageous to you and maybe you let me charge the jury before you argue. But in any event, I prepared this statement as well.

"During the period of your absence the [p. 11] antitrust issues have been resolved. They will not be before you for your consideration. Remaining issues for your determination will be the claim of plaintiff for breach of contract. You are instructed now that in reaching your

verdict in this case you shall consider only that evidence introduced during trial which relates to the issue given to you for your decision.

"You may consider any evidence adduced relating to the antitrust issue only, and if that evidence bears on the issue of breach of contract which is to be the subject of your verdict in this case."

Is this agreeable to you.

MR. GUSTER: Your Honor, I think the jury's entitled to know that the antitrust claims have been resolved in favor of Quikut.

THE COURT: I'm not going [sic] tell them that, no. I'm not going to do that, Dick. They don't have to know that. All they have to know is they're out. Okay, give me a couple minutes. May I see the exhibit, the contract? Would one of you bring me that?

MR. GUSTER: Yes.

(Recess 8:53 – 9:10)

THE COURT: Counsel has given to me as the record already indicates a proposed jury instruction. I've read the case law as it applies, and I think the [p. 12] reference is made in the annotations given to special circumstances which may lead to special damages in a case of consequential damage in this respect. I think that is not applicable here in relation to the facts or the distributor agreement.

However, I don't think it forecloses your argument of that under the charge, which is already given or will be

given by the Court. So, I won't foreclose you in argument in that regard.

MR. MORLEY: The argument that I made prior earlier this morning that the 300,000, et cetera, sales could have been generated?

THE COURT: Yes. I think it would be well for you if I just went ahead and charged them in view of the preliminary and then you can argue the case.

(Jury in the box at 9:12)

THE COURT: I hope you had a prosperous and good weather weekend at least. During the period of your absence the antitrust issues have been resolved. They will not be before you for your consideration. The remaining issue for your determination will be the claim of plaintiff for breach of contract. You are instructed now that in reaching your verdict in this case you shall consider only that evidence introduced during trial which relates to the issue given to you for your decision. You

* * *

[p. 69] notify us that you have reached a verdict.

No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing. And the Court will not communicate with you or any of you on any subjects [sic] which relates to the merits of the case except by doing it either in writing or orally here in open Court.

But you must also keep in mind that all during the period of your deliberations you should not say or write anything which would disclose to anyone, not to me or

not to anyone else, how your deliberations stand numerically or otherwise.

Only when you have all agreed on your verdict, that is, when you have reached unanimous agreement on that verdict, are you permitted to say by way of your verdict what you have decided concerning the issues in this case.

Counsel, aside from what we've discussed, are there any additions or corrections you wish made?

MR. GUSTER: No, your Honor. I think it's clear that the charge will go to the jury.

THE COURT: Yes, sir; it will.

MR. MORLEY: I have nothing further, your Honor.

THE COURT: You may now take this case and give it your fair consideration and return a verdict that

* * *

APPENDIX B

No. 92-4230

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SILVER CLOUD, INC., d/b/a Columbiana Plastics; STEPHEN J. MOTOSKO, II,	)	ORDER
Plaintiffs – Appellants,	)	(Filed
v.	)	Dec. 8, 1992)
NATIONAL KITCHEN PRODUCTS; EDWARD J. MORRIS; QUIKUT, Division of Scott & Fetzer Company,	)	
Defendants – Appellees.	)	

BEFORE: GUY and RYAN, Circuit Judges; and LIVELY, Senior Circuit Judge.

The plaintiffs appeal final judgment in this antitrust action in which judgment was entered in plaintiffs' favor in a single count and plaintiffs' remaining claims were dismissed. The district court entered its judgment on October 14, 1992. On October 27, 1992, defendant Quikut moved for judgment as a matter of law or, alternatively, for a new trial. That motion was filed within ten days of judgment, as calculated under Fed. R. Civ. P. 6(a), and was therefore timely. While that motion was pending, the plaintiffs filed the instant notice of appeal from the dismissal of their remaining claims. Subsequently, Quikut's post-judgment motion was denied.

If a timely motion for new trial is filed by any party, the time for appeal for all parties shall run from the entry of the order denying a new trial. Fed. R. App. P. 4(a)(4); *see Marrical v. Detroit News, Inc.*, 805 F.2d 169, 171 (6th Cir. 1986) (per curiam). A notice of appeal filed before the disposition of such a motion shall have no effect. *Id.*; *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam). A new notice of appeal must be filed within the prescribed time for appeal, measured from the entry of the order disposing of the motion. In the instant case, the district court has entered an order denying the motion for new trial.

Therefore it is ORDERED that this appeal is dismissed *sua sponte* as premature without prejudice to plaintiffs' right to perfect a new, timely appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC. dba COLUMBIANA PLASTICS and STEPHEN J. MOTOSKO, II Plaintiffs vs. NATIONAL KITCHEN PRODUCTS, ET AL Defendants	CASE NO. 1:89-CV-1729 JUDGE SAM H. BELL MOTION FOR PREJUDGMENT INTEREST

Now come Plaintiffs, hereinafter referred to as "Motosko", and hereby move this Court, pursuant to Ohio Revised Code Section 1343.03(A), for prejudgment interest on the jury verdict rendered in this matter on October 7, 1992. A Memorandum is [sic] Support of this Motion is attached hereto and incorporated herein.

Respectfully Submitted,

[Motion denied
/s/ SHB
12/9/92]

(Filed Dec. 12, 1992)

/s/ Michael Morley
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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SILVER CLOUD, INC. dba COLUMBIANA PLASTICS and STEPHEN J. MOTOSKI, II Plaintiffs	CASE NO. 1:89-CV-1729 JUDGE SAM H. BELL
vs.	NOTICE OF APPEAL
NATIONAL KITCHEN PRODUCTS, *et al.*, Defendants	(Filed Nov. 12, 1992)

Notice is hereby given that plaintiffs, Silver Cloud, Inc. d.b.a. Columbiana Plastics and Stephen J. Motosko, II, do hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment in this case (and the decisions of the Court incorporated therein) entered on October 14, 1992.

Respectfully submitted,

/s/ Jack M. Schulman
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Attorney for Plaintiffs Silver Cloud, Inc. d.b.a. Columbiana Plastics and Stephen J. Motosko, II

CERTIFICATION OF SERVICE

A copy of the foregoing "Notice of Appeal" was sent by regular U.S. Mail, postage prepaid, this 12th day of November, 1992, to:

Richard E. Guster, Esq.
Thompson, Hine & Flory
50 S. Main Street
Akron, OH 44308
Attorney for Defendant Quikut

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/s/ Jack M. Schulman
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